

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL **74-2311**

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-against-

AMADEO AUGUSTO LUCIANO SANTELISES

Defendant-Appellant

On Appeal From An Order of
The United States District Court
for the Southern District of New York

Appellant's Brief

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**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA,

Appellee

v.

AMADEO AUGUSTO LUCIANO SANTELISES,

Appellant.

BRIEF FOR APPELLANT

STATEMENT OF ISSUE PRESENTED

1. Whether Appellant's plea of guilty was made voluntarily where he was denied effective assistance of counsel, and neither the Court nor his counsel warned him that one of the consequences of his plea of guilty was mandatory deportation.

STATEMENT OF THE CASE

The appellant, Amadeo Augusto Luciano Santelises, a lawful permanent resident of the United States, plead guilty to fourteen counts of an indictment on December 7, 1965 (App.p.A-13) which had been filed in the Southern District of New York on July 16, 1965. Two counts of the indictment contained allegations of violation of 18 U.S.C. Sec. 1546.

On June 9, 1966 deportation proceedings were commenced by the Immigration & Naturalization Service on the ground that appellant is mandatorily subject to deportation pursuant to Section 241(a)(5) of the Immigration & Nationality Act, 8 U.S.C. Sec. 1251(a)(5), as a person who has been convicted under 18 U.S.C. Sec. 1546. Petitioner was found deportable under Section 241(a)(5), for which there is no administrative relief available.

On April 10, 1972, appellant filed a petition before the District Court of the Southern District of New York, to set aside his guilty plea to counts 18 and 19 of the 1965 indictment on the basis that the plea was not knowingly and voluntarily tendered due to the fact that he had not been informed that deportation was a consequence of a conviction under 18 U.S.C. Sec. 1546.

The District Court denied the petition, and the Court of Appeals affirmed, *United States v. Santelises*, 476 F.2d 787 (2nd Cir. 1973). The Court noted in a footnote that appellant had failed to submit an affidavit of counsel collaborating his allegation that he was unaware that deportation was a probable consequence of the guilty plea and that such failure independently justified the District Court's decision, 476 F.2d at 790, Footnote 3.

On June 10, 1974 appellant filed a new petition for Writ of Error Coram Nobis in the District Court for the Southern District of New York, including an affidavit from the attorney who had represented appellant at the time of his criminal conviction (App. p. A-3).

On July 30, 1974, the District Court again denied appellant's petition from which this appeal is taken.

STATEMENT OF THE FACTS

The appellant, Amadeo Augusto Luciano Santelises, is a lawful permanent resident of the United States, residing here with his wife and American citizen child. On July 16, 1965, Mr. Santelises was charged in an indictment filed in the Southern District of New York, with various offenses connected with the preparation and use of false immigration documents. On December 7, 1965, Santelises, appearing with his attorney, Mr. Robert Mitchell, pleaded guilty to 14 counts of the indictment, two of which contained an allegation of violation of 18 U.S.C. Sec. 1546. On January 28, 1966, sentence was suspended and the petitioner was placed on probation for a period of one year. The period of probation was satisfactorily completed on January 27, 1967.

On June 9, 1966, deportation proceedings were commenced by the Immigration & Naturalization Service on the ground that petitioner is mandatorily subject to deportation (upon order of the Attorney General), pursuant to Section 241(a)(5) of the Immigration & Nationality Act, 8 U.S.C., Sec. 1251(a)(5), as a person who has been convicted under 18 U.S.C., Section 1546, and was found deportable under that Section, for which there is no administrative relief available.

On April 10, 1972, the appellant brought a previous petition before the District Court for the Southern District of New York, to set aside his plea of guilty to counts 18 and 19 of the 1965 indictment. The District Judge concluded that jurisdiction existed under 28 U.S.C. Sec. 1651(a), the "All Writs" Statute, and treated the petition as a request for a Writ of Error Coram Nobis. (Unreported, 72 Civ. 1470).

In his petition filed in 1972, appellant urged that his plea of guilty to counts 18 and 19 of the 1965 indictment was not

knowingly and voluntarily tendered because he was not informed that deportation was a consequence of a conviction under 18 U.S.C., Sec. 1546. The Court rejected this claim without holding a hearing. The Court's dismissal of the petition was based on the holding in *United States v. Parrino*, 212 F.2d 919 (2nd Cir. 1954) to the effect that deportation was a collateral consequence of conviction, of which the accused need not be informed prior to acceptance of his guilty plea. The decision of the District Judge was also based upon the rule of *Grant v. United States*, 451 F.2d 931 (2nd Cir. 1971), to the effect that where a guilty plea was entered prior to the effective date of the amendment of Rule 11 of the Federal Rules of Criminal Procedure, a petitioner for a Writ of Error setting aside his conviction, must submit an affidavit from the attorney who represented him at the time of the plea, in support of an allegation that the petitioner was unaware of the consequences of his plea.

On appeal, the decision of the District Judge dismissing the petition was affirmed by the U.S. Court of Appeals for the Second Circuit. *United States v. Santelises*, 476 F.2d 787 (1973). In its opinion, the Court noted that:

"Santelises does not allege that he was affirmatively misled by counsel, and he has not made out any claim of ineffective assistance of counsel."

In a footnote, the Court added that Santelises' failure to submit an affidavit of counsel corroborating his allegation that he was unaware that deportation was a possible consequence of the guilty plea, independently justified the decision to dismiss below on the authority of *Grant v. United States*, *supra*. (476 F.2d at 790).

On June 10, 1974, Appellant filed a new petition for Writ of Error Coram Nobis, which included the affidavit of Robert Mitchell, &App. A-35), the attorney who

represented appellant at the time in which he had pleaded guilty to the counts of the indictment which subsequently resulted in an order of deportation being entered against him. The affidavit indicates that the petitioner, in 1965, had changed his plea from not guilty to guilty, to the specific counts in the indictment upon the advice of counsel, and that in conferences between said counsel and the appellant prior to his decision to enter the plea of guilty to 14 counts of the indictment, the appellant was never informed that, as an alien present in the United States, he would be subject to deportation upon order of the Attorney General, after a conviction under 18 U.S.C., Sec. 1546. The Affidavit also states that, as far as the declarant knew, the appellant was totally unaware of the consequences of his plea.

SUMMARY OF ARGUMENT

Appellant's plea of guilty to counts 18 and 19 of the indictment should be vacated because appellant's plea of guilty was not made voluntarily in that neither he nor his counsel were aware of the fact that one of the consequences of such plea was the mandatory deportation of appellant and therefore appellant is entitled to a full hearing on the merits of his petition.

ARGUMENT

POINT I

THE JUDGMENT OF CONVICTION PREDICATED UPON THE PLEA OF GUILTY TO COUNTS 18 AND 19 OF THE INDICTMENT SHOULD BE VACATED, IN THAT SUCH PLEA WAS NOT VOLUNTARILY OFFERED

It is well established in American jurisprudence that a guilty plea made under circumstances which deprive it of the character of a voluntary act, is void, and that a conviction based upon such a plea is open to collateral attack. *Machibroda v. United States*, 368 U.S. 437 (1962); *Walker v. Johnston*, 312 U.S. 275 (1940). It is also clear that where a petitioner who has pleaded guilty to the commission of a Federal offense raises substantial questions as to the voluntariness of that plea in a collateral proceeding, he is entitled to a full hearing on his petition. *Machibroda v. United States*, *supra*, at 513.

In the petition filed before the District Court, the appellant asserted that at the time he pleaded guilty to counts 18 and 19 of the indictment, he was not informed by his attorney or by the Court, that one of the consequences of his plea was mandatory deportation upon order of the Attorney General under applicable Federal statutes. The petition alleged that the appellant was completely unaware of such consequence prior to the institution of deportation proceedings against him. The allegations in the petition are supported by the Affidavit of Robert Mitchell, (App. p. 35) the attorney who represented the appellant at his criminal proceeding, sworn to the sixth day of December, 1973. The petition states that the failure of this attorney to advise appellant that deportation was a consequence of his plea of

guilty to violations of 28 U.S.C. Sec. 1546, constituted an effective denial of the assistance of counsel at the time he entered his plea of guilty.

The case law is clear that a defendant's awareness of the consequences of a plea of guilty is one of the factors which bear upon the voluntariness of a confession under the rule in *Machibroda*, *supra*; *Karenfeld v. United States*, 451 F.2d 770 (2nd Cir. 1971); *Jones v. United States*, 440 F.2d 466 (2nd Cir. 1971); *Grant v. United States*, 451 F.2d 931 (2nd Cir. 1971); *Bye v. United States*, 435 F.2d 177 (2nd Cir. 1970). The modern trend has been to include an increasing number of factors within the concept of the "consequences" of the plea. In *Sims v. United States*, 272 F. Supp. 517 (Md. 1966) *aff'd*, 282 F.2d 294, *cert. denied* 390 U.S. 961, the Court held that a guilty plea is not made understandingly and is subject to collateral attack where the defendant does not know the maximum sentence which can be imposed. See, also, *Matthews v. United States*, 308 F.Supp. 456 (1969). Similarly, it has been held that a defendant who pleads guilty without being informed that the law mandates that he will be ineligible for probation or parole, does not plead with an understanding of the consequences of the plea. *Munich v. United States*, 337 F.2d 356 (9th Cir. 1964). See also, *Durant v. United States*, 410 F.2d 649 (1st Cir. 1969); *Bye v. United States*, 435 F.2d 177 (2nd Cir. 1970). Additionally, the modern trend has been crystallized in Rule 11 of the *Federal Rules of Criminal Procedure*, as amended in 1966, which provides that the Court "shall not accept a plea of guilty without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature and consequences of the plea." (Emphasis added). The Supreme Court has held that violation of Rule 11 in the acceptance of guilty plea by the Court after the effective date of the rule, is grounds for *automatic* vacation of the

conviction. *McCarthy v. United States*, 394 U.S. 459 (1969). In situations such as the case at bar, to which the amended rule does not apply, the Supreme Court has reiterated that the defendant has access to the full spectrum of post conviction remedies to attack the voluntariness of a guilty plea. *Halliday v. United States*, 394 U.S. 831 (1969).

In *United States v. Santelises*, *supra*, the Court held on the record before it, that the Trial Judge's failure to inform appellant that conviction under 18 U.S.C., Section 1546 would subject him to deportation proceedings did not render the appellant's plea of guilty involuntary. The Court, however, clearly left open the possibility of a subsequent proceeding to set aside the convictions on a different record. The Court noted the limited nature of its holding at 476 F.2d 789, as follows:

"It is sufficient to state at this time that the mere failure of a District Judge to warn a defendant of the possibility of deportation as a consequence of his plea, does not, without more, amount to a violation of constitutional due process, thereby rendering the plea invalid."

The Court also stated, as an indication of the limited nature of its holding:

" . . . it is clear that Santelises does not allege that he was affirmatively misled by counsel, and he has not made out any claim of ineffective assistance of counsel . . . Santelises failure to submit an affidavit of counsel, corroborating his allegation that he was unaware that deportation was a possible consequence of the guilty plea, independently justified the decision to dismiss below, see *Grant v. United States*, 451 F.2d 931 (2nd Cir. 1971); c.f. *United States v. Wisniewski*, (2nd Cir. 1973); 478 F.2d 274, 284 (1973)."

On the basis of the above, the appellant submits that the allegations made in the present petition, together with the supporting affidavit of Robert Mitchell, Esq., supporting appellant's request for a full hearing before the District Court, in order to determine whether his plea of guilty to the specified counts of the 1965 indictment was knowingly made in the absence of knowledge of the consequences thereof, and in the absence of effective assistance by counsel. It is respectfully submitted that, under the decision of the Court in the previous case, the rule of *United States v. Parrino, supra*, should not bar the appellant's right to a full hearing on the matters raised herein.

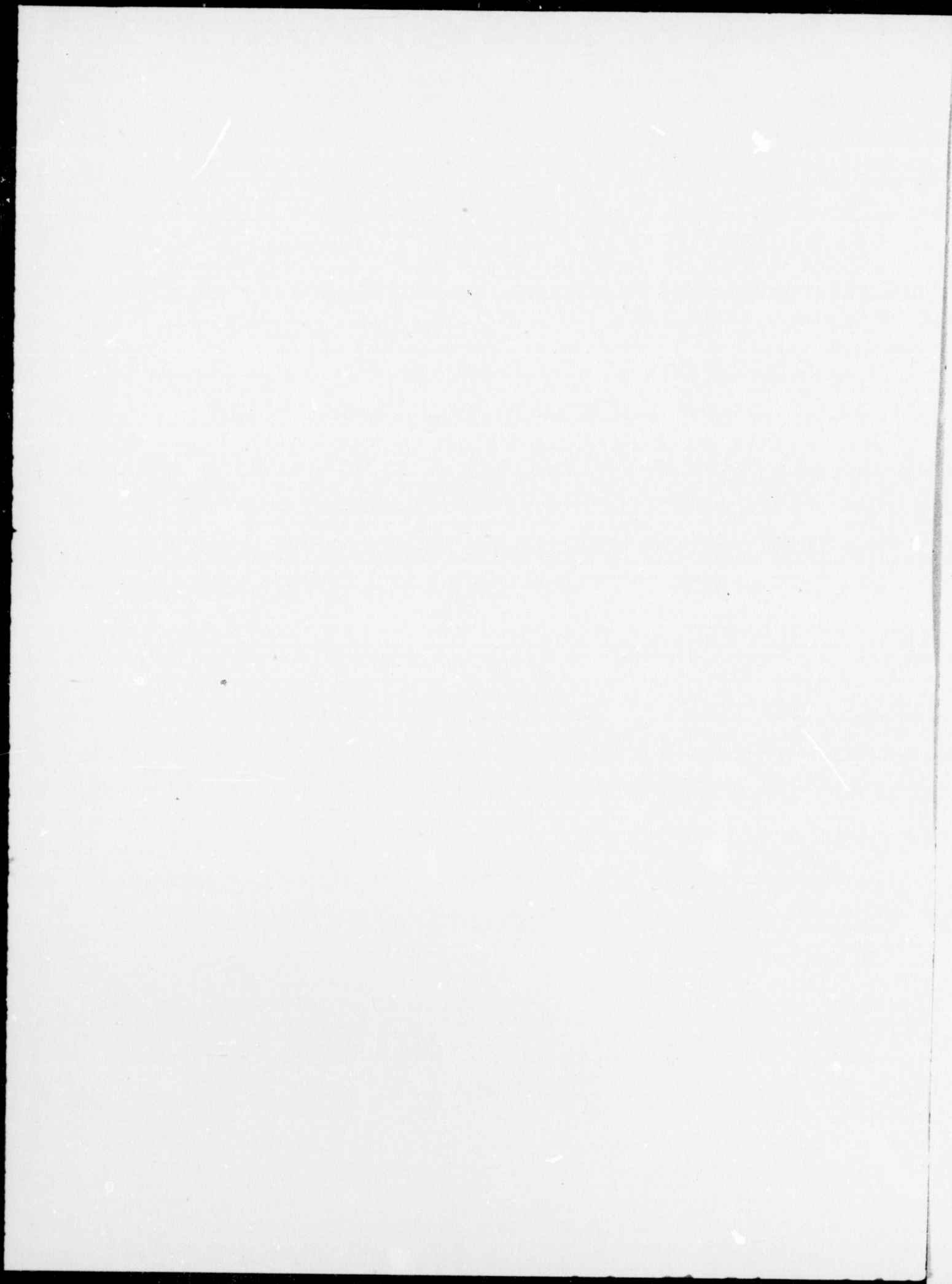
CONCLUSION

Appellant submits that the judgment of the United States District Court for the Southern District of New York dismissing the petition should be reversed and that the Court order the case remanded to the District Court with instructions that the District Court hold a full evidentiary hearing concerning the voluntariness of appellant's plea of guilty to counts 18 and 19 of the indictment.

Respectfully submitted,

FRIED, FRAGOMEN & DEL REY, P.C.
Attorneys for Appellant

AUSTIN T. FRAGOMEN, JR.,
Of Counsel



STATE OF NEW YORK)

: SS:

COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 15 day of Nov. 1974 deponent served the within Brief upon 4 Attorneys

attorney(s) for Appellee

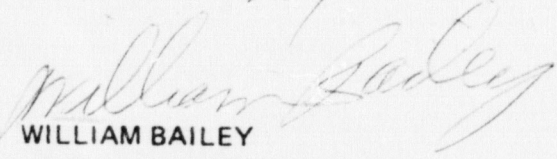
in this action, at M. J. Constance
Sally H.
et al.

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this

15 day of Nov. 1974


WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1976